



## INTERIOR BOARD OF INDIAN APPEALS

Aloha Lumber Corp. v. Alaska Regional Director, Bureau of Indian Affairs

41 IBIA 147 (08/08/2005)



## United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
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ALOHA LUMBER CORP.,	:	Order Affirming in Part
Appellant,	:	and Vacating in Part
	:	
v.	:	
	:	Docket Nos. IBIA 02-15-A
ALASKA REGIONAL DIRECTOR,	:	02-48-A
BUREAU OF INDIAN AFFAIRS,	:	
Appellee.	:	August 8, 2005

Aloha Lumber Corp. (Appellant) appeals from two decisions of the Alaska Regional Director, Bureau of Indian Affairs (Regional Director; BIA) concerning a contract for the sale of timber on four Alaska Native allotments. In Docket No. IBIA 02-15-A, Appellant seeks review of an October 1, 2001, decision of the Regional Director, which denied Appellant's request for a fourth extension of time to complete contract performance, concluded that Appellant had breached the contract by failing to harvest the timber, and declined to refund certain payments Appellant had made to BIA. In Docket No. IBIA 02-48-A, Appellant challenges the Regional Director's December 21, 2001, supplemental decision, which calculated the amount of damages due for breach of the contract at \$607,515, including the payments already made. For the reasons discussed below, the Board affirms both decisions by the Regional Director in relevant part, although it vacates a portion of the Regional Director's October 1, 2001, decision that mischaracterized one of Appellant's payments to BIA.

### Background

In February 1994, BIA, on behalf of the owners of Alaska Native allotments numbered A-52388, A-52386, A-52387, and A-52399A, entered into Contract No. 999S000477 (Port Graham Southside Logging Unit) with Appellant for the sale of timber on the allotments. The allotments are located in the vicinity of the Village of Port Graham, Alaska, on the south side of Port Graham Bay, and consist of 505 acres, of which 366 acres were to be logged. An estimated 6015 thousand board feet (Mbf) net volume of Sitka spruce was designated for harvest, for which Appellant agreed to pay \$101.00 per Mbf, for a total bid value of \$607,515.

The contract contained two payment provisions. One provision, section A8, required an “advance deposit” of \$151,878.75. <sup>1/</sup> Another provision, section A17(12) required an “advance payment,” within 30 days, of 25 percent of the bid value of the contract. In this case, the advance payment amount was the same as the advance deposit amount. <sup>2/</sup>

Standard Provision B4 distinguishes between “advance payments” and “advance deposits” for timber contracts. “Advance payments” must be made within 30 days from the date a timber contract is approved, are not refundable, and may be paid to the allotment owners as soon as received by BIA. See Standard Provision B4.2; see also 25 C.F.R. § 163.16(a) (1993); 25 C.F.R. § 163.23(a) (2004). Advance deposits, on the other hand, are paid “at such times as called for by [BIA] and in such amounts as required by the contract.” Standard Provision B4.3. Advance deposits may be refunded at BIA’s discretion, and a final refund of the unobligated balance of advance deposits may be authorized “after all of the timber covered by the contract has been paid for.” Id. B4.34.

Appellant submitted a \$15,000 bid deposit when it bid on the timber sale. In January 1994, BIA sent the contract to Appellant for signature, advising Appellant that its \$15,000 bid deposit would be retained as part of the required advance payment of \$151,880 <sup>3/</sup> and that Appellant had 30 days, or until February 25, 1994, to pay the \$136,880 balance of the required “advance payment.” Jan. 19, 1994, Letter from Area Director to Appellant; see also Dec. 17,

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<sup>1/</sup> Contract Sec. A8 provided:

“*Payment for Timber.* The Purchaser shall pay for all timber covered by this contract in accordance with the provisions of Section B4.0 of the Standard Provisions. The minimum advance deposit shall be \$151,878.75. In no event shall the advance deposit requested result in a balance of less than \$50,000. See Special payment provisions in section A17.12.”

BIA has a set of Timber Sale Contract Standard Provisions, which were incorporated into the contract with Appellant. Standard Provision B4.0 covers “Payments and Deposits.”

<sup>2/</sup> Contract Sec. A17(12) provided in relevant part:

“The Purchaser shall pay for all the timber covered by this contract in advance of cutting as follows:

a. Advance Payment

An advance payment of 25 percent of the bid value will be paid within 30 days following contract approval and before falling begins. See Standard Provision B4.2 for further requirements concerning advance payments.”

<sup>3/</sup> Twenty-five percent of the bid value (\$151,878.50), rounded off.

1993, Letter from Area Director to Appellant. 4/ After the contract was signed by both parties, BIA sent a letter to Appellant, again characterizing the \$136,880 balance due as an “advance payment.” See Feb. 18, 1994, Letter from Area Director to Appellant.

On February 28, 1994, BIA received Appellant’s payment of \$136,880. The Field Receipt prepared by BIA’s collections officer identified the payment as an “advance deposit.”

In preparation for the sale, BIA had prepared a plan for how the purchaser would remove the harvested timber from the allotments and load it onto ships. The plan was described in the sale prospectus and also incorporated into the contract. It required the purchaser, in this case Appellant, to construct two log transfer facilities (LTFs) on the allotments to move the logs into Port Graham Bay, and to construct one in-water storage area where harvested logs would be collected for loading onto ships for transport. Contract Sec. A17(9)a.

Also prior to the sale, BIA obtained permits for the LTFs and the in-water storage area from the State of Alaska, the U.S. Army Corps of Engineers, and the U.S. Environmental Protection Agency. The permits, which were incorporated into the contract, seasonally restricted the log transfer and in-water storage activities to the period between October 1 and April 30 of each year, in order to avoid interference with commercial and subsistence fishing. See Contract Sec. A17(9)b; Alaska Tideland Use Permit ADL 224342, Attachment A, Special Stipulation No. 23 (Jan. 3, 1990); Department of the Army Permit Modification, Permit No. 2-880274, Port Graham 2, Special Condition 5 (Nov. 13, 1991); and EPA Permit No. AK-004841-1, Sec. I.A.2.a. (Jan. 6, 1989). Appellant assumed full responsibility for compliance with all permit stipulations and applicable regulations. Contract Sec. A17(9)c.

Section A5 of the contract established a deadline for performance:

Unless this contract is extended in accordance with Section B2.5 of the Standard Provisions, the Purchaser shall cut and pay for all designated timber on or before May 31, 1997, and shall complete all other obligations on or before the contract expiration date of September 30, 1997. 5/

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4/ When the contract was awarded, BIA was organized into Area Offices with Area Directors, which subsequently were redesignated as Regional Offices with Regional Directors.

5/ Standard Provision B2.5 treats an extension of time as a contract modification, and Standard Provision B2.3 provides that “the contract may be modified only through a written agreement between the Seller and the Purchaser prior to the expiration of the contract.”

In March 1996, Appellant requested a one-year extension to allow it to pursue an alternative method for transferring and loading harvested timber. Appellant had undertaken no harvest activities and no construction of the LTFs or the in-water storage area specified in the contract, and evidently had concluded that an alternative method for log removal was preferable. Under the proposed alternative, Appellant would use a log loading facility that was being constructed at the nearby Village of Port Graham for an unrelated timber harvest. Appellant recognized that the alternate plan would require obtaining rights-of-way, construction of a temporary haul road, and an agreement with the Village of Port Graham to use its log loading facility. In its request, Appellant noted that it “prefer[red the alternative] method of moving the logs, but if for some reason, the rights-of-way can’t be obtained or some other problem presents itself, we will fall back to the original plan of using the beach float-off and temporary in-water storage.” Mar. 7, 1996, Letter from Appellant to Chugachmiut. 6/

On May 16, 1996, the Area Director approved Contract Modification No. 1, for a one-year extension. The modification recognized that Appellant had requested the extension to allow it to use the Port Graham facility, which had not been an alternative when the contract was executed. The modification recited that the extension would permit Appellant to secure the necessary rights-of-way and a use agreement with Port Graham. The modification revised section A5 of the contract to extend the cut and pay deadline to May 31, 1998, and the deadline for completing remaining obligations to September 30, 1998.

On February 26, 1998, Appellant requested a second extension, this time for an additional two years to complete logging. Appellant still had not undertaken mobilization or harvest activities, and was still pursuing the Port Graham alternative. Appellant’s request again noted that its alternate plan for log loading was dependent upon acquiring rights-of-way from third parties and an agreement with Port Graham. Appellant reiterated its 1996 statement that it preferred the Port Graham alternative, but if that became problematic, Appellant would “fall back to the original plan.” Feb. 26, 1998, Letter from Appellant to Chugachmiut.

Chugachmiut drafted a proposed modification for an extension and sent it to Appellant for signature. In its transmittal letter, Chugachmiut requested that Aloha remit a second payment for the timber in the amount of \$151,880. See Mar. 4, 1998, Letter from Chugachmiut to Appellant. Appellant submitted the requested payment and a signed copy of

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6/ Chugachmiut, Inc. is a consortium of Federally-recognized tribes, of which the Native Village of Port Graham is a member. In 1995, Chugachmiut entered into an Indian Self-Determination Act compact with the United States to administer certain BIA functions. The compact included timber sale contract administration, including the contract at issue in this case. In this role, Chugachmiut served as a contact for Appellant regarding the contract, although contract modifications still required approval by the BIA Area (now Regional) Director.

proposed Modification No. 3. 7/ On April 15, 1998, BIA recorded receipt of the payment from Appellant, and identified it as a “partial payment” for the timber contract, with a notation to “deposit it in a suspense account.” BIA subsequently distributed the payment to the allotment owners.

On May 21, 1998, the Acting Area Director approved Contract Modification No. 3 for the second extension. The modification amended section A5 of the contract to change the cut and pay deadline to June 30, 2000, and the deadline for the remaining obligations to September 30, 2000. The recitals in the modification stated that “[Appellant] has requested an extension of time to provide for securing necessary permits covering log transfer through the loading facility operated by the Port Graham Corporation, and complete the logging and contract requirements, and \* \* \* [Appellant] \* \* \* with Chugachmiut’s assistance [has] experienced untimely delays, at no fault of their own, in securing necessary permits and agreements to use the loading facility from the Port Graham Corporation.” Contract Modification No. 3.

On December 15, 1998, Port Graham Corporation signed a special use permit for Appellant to use the Port Graham sortyard and barge dock facility. See Feb. 8, 1999, Facsimile from Appellant to Chugachmiut. 8/ It is unclear from the record what efforts Appellant had made to obtain the necessary rights-of-way for a haul road to the Port Graham facility.

On February 11, 1999, Appellant again wrote to Chugachmiut, proposing a third extension, for an additional two years. The letter stated that the current market made the timber sale uneconomical, and that Appellant was exploring some alternative markets or other alternatives that would make the harvest economical for Appellant. Appellant enclosed a draft modification, which recited the following grounds for the extension: “[Appellant has] requested an extension of time to allow sufficient time for export and domestic log markets to recover from the current low values and to incorporate additional timber volume from other

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7/ Contract modification “No. 2,” signed by the Area Director on February 23, 1995, updated two exhibits to incorporate renewed permits from the State of Alaska and the Army Corps of Engineers. Apparently this modification was originally unnumbered, and was designated as “No. 2” after the initial May 1996 extension had already been designated “Modification No. 1.”

8/ The facsimile was sent by Mark Stahl, an Alaska forester with Resource Management Services, Wasilla, AK, whom Appellant retained in 1999 as its agent to assist with the project. It appears that Appellant may at some point have hired Mr. Stahl as an employee. For convenience, the Board will refer to correspondence from Mr. Stahl as from Appellant, regardless of whether it appears on Resource Management Services stationery or on Appellant’s stationery.

allotments in the Port Graham area thereby making harvest economically viable.” See Notice of Appeal, No. IBIA 02-15-A, Ex. D.

Later in February 1999, Appellant submitted to Chugachmiut its operating plan for the logging operation. The plan proposed to commence operations in August 1999. Appellant

propose[d] to utilize the existing sortyard and log transfer facility (LTF) at Port Graham for transportation of logs and/or log bundles from the uplands to vessel. Therefore it is anticipated that the two sortyards, two LTF’s and the rafting grounds [as originally provided in the contract] will not be necessary. The Operating Plan Map in Appendix A reflects this by indicating the sortyards, LTFs and rafting grounds as optional. In the event that [Appellant] deems it necessary to utilize some or all of the original proposal to locate these facilities within the sale area the BIA Forester-in-Charge will be notified and supplied with the appropriate construction plans.

Port Graham Southside Timber Sale Operating Plan at 3 (Feb. 1999). The plan anticipated that the timber harvest would take four months, from August through November 1999. Id. at 6.

In response to a request from Chugachmiut for more information, Appellant reiterated its intent to use the Port Graham facility for all of its log transfer activities, for which it had obtained an agreement with Port Graham Corporation and Port Graham Village Council. Although Appellant stated that it did not plan to use in-water transfer “at this time,” it requested “that the permits to construct the two log transfer facilities, sortyards and the rafting grounds” under the original plan “be retained by BIA as a contingency in case something unexpected arises that would preclude use of the [Port Graham] dock.” Mar. 9, 1999, Letter from Appellant to Chugachmiut.

Appellant then developed a third alternative for removing logs from the allotments and loading them onto ships — a ramp barge, which would allow loading from the allotments without any in-water storage. <sup>9/</sup> On December 30, 1999, Appellant submitted an application to the State for two new tideland permits for the ramp barge alternative, to be used seasonally between the months of February and November. Appellant stated that it “anticipated that operations will begin in February of the year 2000.” Dec. 30, 1999, Letter from Appellant to State (Notice of Appeal, No. IBIA 02-15-A, Ex. F).

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<sup>9/</sup> Appellant contends that it was continuing to experience difficulty with using the Port Graham facility. The Regional Director asserts, Answer Brief, No. IBIA 02-15-A, at 20, that Appellant may have sought a third alternative to avoid costs associated with the other two alternatives.

On February 23, 2000, Chugachmiut sent Appellant a draft contract modification in response to its February 1999 request for an additional two-year extension beyond the existing June 30, 2000, and September 30, 2000, deadlines. The letter reminded Appellant that the Corps of Engineers permit for the original LTFs would terminate at the end of the year 2000 and would not be extended. The letter also noted that Appellant had “the option, if approved to design and develop your own LTF system. Mark [Stahl], mentioned the possibility of using a ramp barge.” Feb. 23, 2000, Letter from Chugachmiut to Appellant (Notice of Appeal, No. IBIA 02-15-A, Ex. F).

Appellant signed the draft contract modification (“No. 4”) on February 28, 2000, and returned it to Chugachmiut for transmittal to BIA. As then drafted, the modification justified the extension using language similar to Modification No. 3, reciting Appellant’s request for additional time to secure necessary permits and agreements to use the Port Graham facility. It added, however, that Appellant had requested an extension “to allow sufficient time for export and domestic log markets to recover from the current low values” and that Appellant was interested in making an offer on another timber sale then under preparation in the Port Graham area.

On March 3, 2000, Chugachmiut forwarded the requested additional two-year extension to BIA, recommending approval. BIA revised the draft modification to limit the extension to one year. BIA also omitted the proposed new justifications based on the depressed timber market and additional timber sales, and also deleted language that had been included in Modification No. 3 concerning “untimely delays” through “no fault” of Appellant.

On March 21, 2000, Chugachmiut sent an e-mail to Appellant, attaching the revised modification, and stating: “The revisions are based on BIA provisions they wanted. Note the time element.” Mar. 21, 2000, E-mail from Chugachmiut to Appellant (Notice of Appeal, No. IBIA 02-15-A, Ex. F). Appellant signed the revised modification, and on March 30, 2000, the Regional Director approved Contract Modification No. 4. The modification amended section A5 of the contract to extend the cut and pay deadline to September 30, 2001, and the deadline for completing remaining obligations to December 31, 2001.

By letter dated April 3, 2000, the Regional Director transmitted the approved modification to Chugachmiut. In that letter, the Regional Director stated that “[p]er conversation with Gene Long, Director of Forestry and Fire Management, [Chugachmiut,] it was agreed that this would be the final modification for this timber contract.” There is no evidence in the record that Appellant was advised of the Regional Director’s position concerning further modifications.

In April 2000, the State forwarded Appellant’s tideland permit applications to Chugachmiut for the ramp barge project, indicating that Appellant was willing to work under



BIA's existing tideland permit for the ramp barge, with the exception of the seasonal restrictions that limited log-loading activities to October 1 through April 30. The State indicated that it was beginning the process for modifying BIA's existing tideland permit "using the specifications from [Appellant's December 30, 1999,] applications." April 21, 2000, Letter from State to Chugachmiut.

The State prepared the modification for BIA's tideland permit as requested by Appellant, and on August 3, 2000, the Regional Director approved the modified tideland permit. On August 8, 2000, the State sent the executed tideland permit modifications to Chugachmiut.

As modified, the tideland permit deleted the original authorization for "the placing of temporary log storage, transfer and 'float-off' facilities on state-owned tidelands that would operate seasonally October 1 through April 30," and replaced it with the following provisions:

This permit authorizes seasonal use of the tide and submerged lands between **February 1st and November 30th** during the term of the permit.  
\* \* \* (no in-water log storage or float-off facilities will be authorized) \* \* \*.

Modified Tideland Permit ¶¶ 4, 5.

This permit authorizes **use** of the subject state-owned tide and submerged lands only from February 1 through November 30 of each year during the permit period \* \* \*. No logs, log bundles, or log rafts shall be placed into the water or onto the tidelands.

Modified Tideland Permit ¶ 5.m(19).

On May 21, 2001, Chugachmiut wrote to Appellant, reminding Appellant that the cut and pay deadline was September 30, 2001, and the deadline for completing remaining obligations was December 31, 2001. Appellant responded by requesting a two-year extension, based on a "very poor market for that grade of Sitka spruce" and "to allow additional time for the log markets to recover." May 31, 2001, Letter from Appellant to Chugachmiut. The letter further stated: "It is unclear at this time how long it will take for the Japanese economy to sort out its economic troubles but two years may be enough to tell if that will occur in the foreseeable future. As soon as log market conditions improve to the point of economic feasibility we will immediately commence harvest operations." Id.

Chugachmiut prepared a draft contract modification, limited to one year, and on June 29, 2001, sent it to Appellant for review and signature. Chugachmiut's transmittal letter stated:

There is no guarantee that this modification will be approved by [BIA]. However, I will carry it forward to [BIA] as per your request. The modification will be requested for one year.

\* \* \* \* \*

If the modification is not granted, you will need to make arrangement for completion of the contract. A detailed time line on how you propose to fulfill the contract requirement is requested.

If a reasonable plan for the contract completion is not presented and the modification is not approved procedures to terminate the contract will commence.

June 29, 2001, Letter from Chugachmiut to Appellant.

Appellant signed and returned the proposed one-year contract modification (“No. 5”) to Chugachmiut for submission to BIA. Appellant’s transmittal letter stated that “[a]ll the permits are in place for operations to commence; we are just waiting for the log market to improve to the point where we can at least break-even on the sale.” July 10, 2001, Letter from Appellant to Chugachmiut. The proposed modification recited as the sole reason for the extension that “[Appellant] has requested an extension of time to allow for log market recovery.”

On July 16, 2001, Chugachmiut forwarded the proposed modification to the Regional Director. 10/

On July 19, 2001, Chugachmiut sent another letter to Appellant, again enclosing copies of the proposed modification, and again stating that there was no guarantee that the modification would be approved by BIA, and that if the modification was not granted, Appellant would need to make arrangements to complete contract performance.

On July 31, 2001, 11/ for reasons that are not clear from the record, Chugachmiut forwarded another copy of the proposed modification and one-year extension to the Regional Director.

On October 1, 2001, the Regional Director denied Appellant’s request for a fourth extension of the contract. The Regional Director found that an additional extension would not be in the best interest of the allotment owners. Among other things, the Regional Director noted that Appellant had made “no unqualified commitment to perform the harvest \* \* \* by

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10/ The year on the letter is misdated as “2000.”

11/ The year on the letter is misdated as “2000.”

any date certain,” that Appellant — not the allotment owners — would be the principal beneficiary of a further extension, and that no provision had been made in the contract to compensate the owners — who had been entitled to compensation in 1997 under the original terms of the contract — for the delay that had already occurred. Oct. 1, 2001, Decision at 2-3.

The Regional Director also found that the payments Appellant had made under the contract — \$15,000 and \$136,880 at the outset, and another \$151,880 in 1998 — were all “advance payments” that were not refundable. The Regional Director further concluded, however, that if his characterization of the 1998 payment was incorrect, he nevertheless was declining to refund any amount “at this time” because Appellant may be liable to the allotment owners for breach of contract damages. Id. at 4.

Finally, in his October 1, 2001, decision, the Regional Director concluded that Appellant had breached the contract by not harvesting the timber as required. Anticipating an argument by Appellant that it still would have completed timely performance in 2001 if BIA had immediately decided and notified Appellant that its request was being denied, the Regional Director found it unlikely that Appellant would have been willing or able to complete the harvest within the roughly 2 1/2 months remaining under the contract when BIA received the extension request in July 2001.

On December 21, 2001, the Regional Director issued a supplemental decision, finding that Appellant was liable to the allotment owners in the amount of \$607,515, for breach of contract, including the \$303,760 already paid. The Regional Director’s calculation of damages was based on an appraisal prepared by Chugachmiut of the then-current market value of the timber, compared with the amount the allotment owners were entitled to receive under the contract. The appraisal concluded that as of December 2001, the timber had a negative market value because the cost of harvesting would exceed the sale value. Based on the appraisal, the Regional Director found that the total damages suffered by the allotment owners was the contract sales price — \$607,515. In addition, the Regional Director decided not to attempt to resell the timber to mitigate the damages because of the unlikelihood of a sale under then-current market conditions, the absence of authority in the existing powers of attorney from the owners for BIA to offer the timber for resale below \$35/Mbf, and changes in allotment ownership that would warrant updating or replacing the powers of attorney.

Appellant appealed from the Regional Director’s October 1, 2001, and December 21, 2001, decisions. Appellant and the Regional Director filed briefs in both appeals.

### Discussion

Appellant has the burden to prove that the Regional Director’s decisions were erroneous or not supported by substantial evidence. Winlock Veneer Co. v. Acting Juneau

Area Director, 20 IBIA 3, 15 (1991) (Winlock I). The Board reviews questions of law and the sufficiency of evidence de novo. See Navajo Nation v. Navajo Regional Director, 40 IBIA 108, 115 (2004), and cases cited therein. When BIA makes a decision based on the exercise of discretion, the Board will not substitute its judgment for that of BIA, but may review whether BIA provided an adequate explanation for its decision and gave proper consideration to all legal prerequisites in the exercise of its discretion, including any regulatory standards. See id.

No. IBIA 02-15-A — October 1, 2001, Decision

In its notice of appeal, 12/ Appellant makes four arguments: (1) Appellant did not breach the contract because (a) the unavailability of the Port Graham facility and post-1995 timber market decline were factors beyond Appellant's control that made performance impossible or impracticable, and (b) BIA interfered with Appellant's performance because Appellant could have harvested the timber if BIA had notified it immediately that the extension would be denied; (2) BIA does not have authority to determine if a breach of contract has occurred; (3) Appellant's two payments of \$151,880 were "advance deposits," not "advance payments," and therefore BIA must refund those payments; and (4) BIA may have breached the contract.

The Board can summarily dispose of Appellant's second and fourth arguments. For its second argument, Appellant cites no authority for its argument that BIA — and presumably the Board — lack authority to make an administrative determination that Appellant breached the contract. Obviously, the Department's decision in this case is subject to judicial review, and is not self-enforcing, but the Board rejects Appellant's novel proposition that BIA is precluded from administratively determining that a party has breached a contract and administratively calculating damages. See, e.g., Walch Logging Co. v. Assistant Portland Area Director, 11 IBIA 85 (1983) (liability and damages determination for timber contract breach); Winlock Veneer Co. v. Acting Juneau Area Director, 22 IBIA 314 (1992) ("Winlock II") (same).

Appellant provides no details and never articulates the basis for its fourth argument, nor does it state any duty owed to Appellant under the contract that BIA allegedly breached. Assuming the Board would have jurisdiction over this allegation, the Board finds that Appellant has failed to meet its burden of proof to demonstrate that BIA breached the contract.

Appellant's remaining arguments — that performance of the contract was impossible or impracticable, and that BIA interfered with Appellant's performance — are also unconvincing.

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12/ Appellant relied on the arguments contained in its notice of appeal in lieu of filing an opening brief.

Appellant's notice of appeal completely ignores the original plan to which Appellant agreed in the contract for log transfer and loading — construction of the two LTFs on the allotments and an in-water storage facility. Instead, Appellant suggests that all parties agreed that the Port Graham facility was to be *the* log transfer and loading facility, and that circumstances beyond Appellant's control — difficulty in obtaining rights-of-way and the depressed timber market — made performance impossible or impracticable. Nowhere in its notice of appeal does Appellant contend that the original plan to which it agreed was impossible or impracticable.

In its reply brief, however, Appellant contends that the parties recognized that the original plan was impossible to perform because transferring and loading logs during the winter was impossible. Appellant argues that the parties replaced the original plan with the Port Graham facility — removed it from the contract entirely — and that the difficulties described above regarding use of the Port Graham facility prevented performance.

Appellant's arguments are not supported by the record, and indeed are contradicted by Appellant's own actions. Both in 1996 and 1998, when Appellant requested its first two extensions, Appellant expressly committed itself to “fall back to the original plan,” if the Port Graham facility arrangements did not work out. See supra, 41 IBIA at 150. And in 1999 — five years into the contract — Appellant's own operating plan included the original LTFs and in-water storage area as an option, and Appellant expressly requested that BIA retain the permits for the original plan “as a contingency in case something unexpected arises that would preclude use of the [Port Graham] dock.” See supra, 41 IBIA at 152. Nowhere during the course of the contract did Appellant contend that the original plan was impossible or impracticable, such that the contract could not be performed under the original terms.

The issue here is not whether BIA supported the Port Graham facility as an additional option available to Appellant. It clearly did. The issue is whether the original plan was impossible or impracticable, and whether once Appellant was allowed to use the Port Graham facility, it was also *precluded* from using the original plan. The answer is no. Appellant obviously favored pursuing the Port Graham alternative, at least for awhile. But the record does not support Appellant's contention that it considered, or the parties considered, the original plan to be impossible, or even impracticable to the extent it could not be treated as an option. And clearly Appellant did not believe it was precluded from “falling back” to the original plan, if necessary. Notably, the parties never discussed removing the original plan from the contract, and none of the extensions to the contract expressly modified section A17(9),

which required the original plan. 13/ The modifications did not recite any difficulty with the original plan.

Appellant contends that the various modifications to the contract recognized that it was not at fault. At most, the reasons recited for the extensions recognized that delays associated with construction of the Port Graham facility, which impeded Appellant's ability to use that option, were not its fault. None of the modifications, however, found that Appellant was not at fault for nonperformance of the contract itself. Rather, as characterized by the Regional Director, Answer Brief at 37, the extensions were an accommodation to Appellant.

It is true that in August 2000 — 6 1/2 years into the contract — the original plan ceased to be available to Appellant, when the State modified BIA's original tideland permit to preclude in-water storage and to change the seasonal use to accommodate Appellant's ramp barge plan. But the only reason the original plan ceased to be available was because Appellant agreed to have the original permit modified, rather than obtain new tideland permits for its ramp barge plan. As such, to the extent the original plan was no longer an option in August 2000 under the permit then in place, it was due to Appellant's own actions, not because it was impossible or impracticable. 14/

Appellant, for whatever reasons, may have preferred using transfer and loading options other than the one to which it originally agreed, but the Board finds that Appellant has not shown that the original plan was either impossible or impracticable.

Nor did the timber market decline during the course of the contract render performance impossible or impracticable. Appellant alternates between asserting that the depressed timber market rendered performance impossible or impracticable, and contending that had it been given proper notice that the contract would not again be extended, it might have been able to harvest the timber and broken even financially. The Board finds that Appellant's argument of

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13/ In light of the justifications recited for the extensions, however, it does appear that the parties impliedly modified the mandatory nature of the language in section A17(9) concerning the original plan by recognizing that the original plan was not the exclusive means available to Appellant for log transfer and loading.

14/ In its reply brief, Appellant contends, apparently as part of its "impossibility" argument, that because the permits for the project had been issued to BIA, and were not transferrable or assignable, Appellant "could not harvest under these permits." Reply Brief at 3. There is no evidence in the record that any of the regulatory agencies took this view, or that Appellant ever believed this to be an obstacle. The fact that the State was willing to allow Appellant to apply for a modification of BIA's permit, and to work under that modified BIA permit, refutes Appellant's contention that it could not perform under BIA's permits.

impossibility or impracticability, based on a downturn in the timber market, fails for the same reasons the Board rejected a similar argument in Kombol v. Acting Assistant Portland Area Director, 19 IBIA 123, 128-33 (1990). Volatility in the timber market is foreseeable, and by the nature of the contract — a fixed price per Mbf, with only the possibility of an upward adjustment, see Contract Sec. A17(12)b., and with a deadline for completion — Appellant bore the risk of a market downturn.

The Board also rejects Appellant's argument that BIA interfered with its performance by failing to notify Appellant immediately that a fourth contract extension would not be granted. First, BIA had no obligation under the contract either to grant another extension or to respond to a requested extension within any particular time period. Second, Appellant did not even submit its request for a fourth extension to Chugachmiut until May 31, 2001. <sup>15/</sup> In Chugachmiut's letter dated June 29, 2001, Appellant was explicitly put on notice that there was no guarantee that BIA would approve the extension and that if an extension was not granted, Appellant would need to make plans to complete performance. See supra, 41 IBIA at 154-55. Even then, Appellant did not express any sense of urgency to either Chugachmiut or to BIA that an immediate decision was needed. Under the circumstances, Appellant cannot now blame BIA for failing to provide an immediate response. Third, the record supports the Regional Director's conclusion that even if BIA had immediately denied the extension when it received the request in July 2001, it is unlikely that Appellant would in fact have completed the harvest before the deadline.

Appellant's contention that it is "positive" that it "could have" completed logging in two months, Notice of Appeal at 6, is belied by its own operating plan (which projected a four-month harvest), by the fact that Appellant concedes, Reply Brief at 9, that it had not mobilized any equipment for the harvest, and by the assertions in Appellant's own letters that it was not prepared to harvest the timber until market conditions improved. As the Regional Director points out, Answer Brief at 33, Appellant appeared more concerned at the time with the disposition of the payments it had made thus far, rather than showing any interest in undertaking and completing performance. The Board finds that BIA's failure to immediately make a decision and notify Appellant that the contract would not be extended a fourth time did not "interfere" with Appellant's performance of the contract and does not constitute a defense to breach of contract.

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<sup>15/</sup> Appellant's Notice of Appeal, at 6, suggests that BIA received its request for another extension in March 2001, and that an immediate denial would have allowed Appellant six months to complete the harvest. Although the Regional Director's Answer Brief points out the error, Appellant pursues the argument in its reply brief, notwithstanding the considerably shorter time between its request and the deadline for performance.

For the first time in its reply brief, Appellant contends that BIA is estopped from or waived its right to deny Appellant a fourth extension on the contract. Appellant also contends that denial of the extension was not in the best interest of the allotment owners.

The Board generally will not consider arguments raised by an appellant for the first time in a reply brief. See Hunter v. Acting Navajo Regional Director, 40 IBIA 61, 68 n.5 (2004); Tendoy v. Portland Area Director, 33 IBIA 303, 308 n.5 (1999); Quinault Indian Nation v. Portland Area Director, 33 IBIA 6, 19 n.6 (1998); Lopez v. Acting Aberdeen Area Director, 29 IBIA 5, 10 (1995); Winlock Veneer Co. v. Acting Juneau Area Director, 28 IBIA 149, 157 (1995) (“Winlock III”). The Board sees no reason here to depart from that practice, particularly in light of a record indicating that Appellant would not prevail on even a traditional estoppel/waiver argument, let alone such an argument against the Government, cf. State Bank of Eagle Butte v. Director, Office of Economic Development, 41 IBIA 43, 52-55 (2005), and given the fact that Appellant would lack standing to assert the interests of the allotment owners, none of whom appealed the Regional Director’s decision.

In response to Appellant’s third argument, that its payments in 1994 and again in 1998 were advance deposits, the Regional Director now concedes that he incorrectly classified the 1998 payment as a nonrefundable “advance payment,” rather than as a refundable “advance deposit.” Therefore, the Board will vacate that portion of the Regional Director’s decision. The parties continue to disagree on whether the Regional Director properly treated the 1994 payments as advance payments, and whether the Regional Director is required to refund the 1998 advance deposit to Appellant.

Section A17(12) of the contract, Standard Provision B4.2, and 25 C.F.R. § 163.16(a) (1993) all required that the advance payment be made within 30 days from the date of contract approval. BIA’s correspondence with Appellant when the contract was finalized specifically advised Appellant that its \$15,000 bid deposit would be applied as an advance payment, and that the balance due for the advance payment was \$136,880. See supra, 41 IBIA at 148. In contrast, section A8 of the contract, for an advance deposit, contained no time frame, and Standard Provision B4.3 provides that advance deposits are to be made “at such times as called for by the Superintendent.” The only evidence in the record to suggest that Appellant’s \$136,880 payment was an advance deposit rather than an advance payment is the field receipt prepared by the BIA collections officer. The Board agrees with the Regional Director that the notation on the field receipt was simply a mistake, and did not change the character of the payment. Viewed as a whole, the record fully supports the Regional Director’s conclusion that



the \$15,000 and \$136,880 payments were properly treated as the required \$151,880 nonrefundable advance payment. 16/

Even if the \$151,880 payment made in 1998 should have been characterized as an advance deposit, rather than an advance payment, as the Regional Director now concedes, the Board concludes that the Regional Director did not err in declining to refund the payment to Appellant when the contract expired and Appellant had failed to perform. 17/

Appellant contends that because the advance deposit provision in the contract required a minimum \$50,000 advance deposit balance during the contract, BIA is somehow obligated to at least refund the amount of its advance deposit in excess of \$50,000. The contract provision, however, set a *minimum* required deposit, not a maximum. As such, it provides no basis to conclude that the Regional Director was required to refund all amounts in excess of the minimum. In addition, as the Regional Director responds, Answer Brief at 46, the minimum balance requirement does not apply in the present context, where logging was never begun.

Under the terms of the contract, a refund of an advance deposit is discretionary with BIA. Standard Provision 4.34. In addition, a final refund of unobligated balances of advance deposits may be authorized “after all of the timber covered by the contract as been paid for.” Id. In this case, Appellant has not paid for all of the timber covered by the contract. Under the circumstances, the Board finds that the Regional Director did not abuse his discretion by declining to refund Appellant’s 1998 payment until the extent of Appellant’s liability may be finally determined.

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16/ Appellant treats the \$15,000 bid deposit and \$136,880 payment as a single payment, contending that the field receipt identified it as an “advance deposit.” In fact, the Jan. 20, 1994, field receipt for the \$15,000 payment clearly identified it as a “bid deposit/advance payment,” consistent with BIA’s correspondence that the bid deposit from the party awarded the contract would be applied to the advance payment requirement.

17/ Because BIA treated the 1998 payment as an advance payment, it distributed the funds to the allotment owners. Nevertheless, the Regional Director’s decision did not treat that as a reason to withhold a refund, in the event his characterization of the payment was incorrect. Rather, the Regional Director appears to presume that funds would be available to BIA to “refund” Appellant’s deposit, if that was required or otherwise appropriate.

As described earlier, after finding that Appellant had breached the contract, the Regional Director ordered a new appraisal of the timber, which was completed in December 2001. The appraisal concluded that the timber had a negative market value. Based on that appraisal and on several other factors impeding an immediate resale, the Regional Director declined to attempt to re-sell the timber to avoid or reduce damages, and found that Appellant was liable for the contract sales price of \$607,515.

In reviewing a BIA decision calculating damages for breach of contract, the Board will uphold the decision if it is reasonable and based on substantial evidence in the record, but will set it aside if BIA has calculated damages improperly or in violation of contractual or regulatory requirements. Walch, supra, 11 IBIA at 101.

Appellant does not take issue with the Regional Director's assertion that the measure of damages in this case is governed by section B2.7 of the contract, which provides:

**Failure to Complete Contract.** In the event of failure to complete all obligations assumed under the contract, the Purchaser shall be liable for the depreciation in the value of the remaining timber and for any costs or expenses incurred by or caused to the Seller or the Government as result of such failure, in an amount to be determined by the Approving Officer.

Appellant contends, however, that the Regional Director's calculation of damages was incorrect because (1) the 6015 Mbf volume figure was only an estimate, based on a flawed methodology; (2) even if the 6015 Mbf figure was a reasonable estimate when the contract was entered into, BIA subsequently removed a substantial amount of timber from the contract; and (3) BIA's appraisal was erroneous because BIA applied incorrect values to the timber volume for (a) timber sale prices, (b) the assumed export market percentage, and (c) the assumed percentage for profit and risk. <sup>18/</sup> Appellant contends that its own appraisal demonstrates that the timber can actually be harvested at a substantial profit.

For estimating the volume of marketable timber on the allotments, BIA marked each of the 22,029 trees designated for cutting, from which it randomly selected 1,271 trees to measure and grade. The 6015 Mbf estimate is based on the actual measurement and grading of that 1,271 random sample.

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<sup>18/</sup> Appellant also contends that the operating costs included in BIA's appraisal were too low, but concedes that this would actually work in Appellant's favor in calculating damages. Given this fact, the Board sees no reason to address this allegation of error.

Appellant contends that because “only 5.77% of the trees intended to be harvested were measured for volume and grade,” the methodology BIA used for estimating total volume was “off the wall.” Opening Brief at 7. As shown on the appraisal documents attached to the Regional Director’s decision, and as further explained in the Regional Director’s answer brief, at 6, using a random sample of 1,271 trees yielded a statistical sampling error rate of 2.658 percent. That error rate was well below the 5% sampling error considered reliable in BIA guidance for a lump sum sale. In a lump sum sale, the purchaser pays a fixed lump sum for a pre-determined volume of timber, making it important to reliably calculate the volume in advance. By contrast, in an estimated volume sale, the purchaser agrees to pay a fixed amount per Mbf, rather than based on a pre-determined volume, in which case the volume estimate need not be as reliable. Notably, because purchasers only pay for the actual volume under timber sale contracts based on estimated volumes, BIA guidelines permit a less accurate estimate — up to a 15% sampling error — in calculating the timber volume included in such a contract. In the present case, even though the sale contract was for an estimated volume of timber, BIA employed the more accurate methodology that would have supported a lump sum sale.

Of course, had the timber actually been harvested, an even more reliable volume figure based on actual scaled volume would be available. Such figures are unavailable, however, because Appellant failed to perform the contract. Under the circumstances, the Board concludes that the Regional Director’s methodology for calculating the volume of timber was reasonable and supported by substantial evidence in the record.

Appellant also alleges that the 6015 Mbf figure is incorrect because BIA removed timber from the contract. Appellant refers to no evidence in the administrative record to support that assertion, but attaches a Declaration to its reply brief, which asserts that a consultant for the Village of Port Graham “was adamant” that there were at least 20 acres on one of the allotments that the Village “would not want to be harvested.” Declaration of Mark Stahl at 5. It was not for the Village, however, to decide whether timber would be removed from the contract. Appellant has offered no evidence that BIA removed any timber from the contract, or even that a request to remove timber was forwarded to BIA for review. The Board rejects Appellant’s assertion that BIA removed timber from the contract.

Appellant proffers timber sales price information from April 2002 to support its contention that the Regional Director’s appraisal incorrectly concluded that the timber had a negative value. Appellant offers no evidence, however, that the timber sales price information used in BIA’s 2001 appraisal was incorrect at the time. The threshold issue, then, which also disposes of Appellant’s argument, is whether market conditions from April 2002 may be used to evaluate whether the Regional Director’s December 21, 2001, decision was in error.

The general rule is that damages for breach of contract are measured as of the time when performance should have taken place. Energy Capital Corp. v. United States, 302 F.3d 1314, 1330 (Fed. Cir. 2002); see Robinson v. United States, 50 Fed. Cl. 368, 370 (2001). In the present case, Appellant was required to cut and pay for the timber by September 30, 2001, and to complete all remaining obligations by December 31, 2001. Therefore, timber sales price information for April 2002 is irrelevant for the Board's review of the Regional Director's decision. The Board concludes that it was not error for the Regional Director to rely on timber market conditions in December 2001 for calculating damages. <sup>19/</sup>

Appellant next contends that BIA's appraisal improperly assumed that 50% of the timber could have been sold on the export market. Appellant's counter appraisal assumes that 89% of the timber could be sold on the export market. Appellant's appraisal, however, is based on April 2002 market conditions, and therefore suffers from the same problem as its proffered sales price information. In addition, even if Appellant's assumptions were based on a relevant time period and were reasonable, it would not follow, and Appellant has not shown, that the Regional Director's assumptions were unreasonable or erroneous. The Board finds that Appellant has not met its burden to show that the Regional Director's assumption of a 50% export market for the timber in December 2001 was unreasonable or not supported by the record.

Appellant also challenges the 20% profit and risk contingency figure used for BIA's appraisal, contending that "it is unreasonable to apply a flat rate (20%) to the sales value," and that "[i]n the timber industry, it is far more accurate to calculate profit by subtracting operating costs and stumpage from the selling value." Opening Brief at 9.

An appraisal, however, cannot be expected to use actual profit or loss. Instead, it must generally rely on reasonable assumptions. BIA did not assume, as Appellant argues, "that a 20% profit is reasonable and ordinary in the timber industry." Opening Brief at 9. Rather, the 20% figure is based on a combination of profit *and risk*, the latter factor representing a margin to allow for contingencies. In his Answer Brief, at 15, the Regional Director notes that BIA used the same appraisal formula in 1993 for setting the minimum bid price for the timber at issue in this case, and that one of the bids was very close to BIA's minimum price, lending support to the reasonableness of BIA's appraisal. Interestingly, Appellant's own calculations to support its argument that the timber could profitably be harvested in 2002 show an overall

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<sup>19/</sup> Arguably, because the cut and pay deadline was Sept. 30, 2001, the Regional Director might have used market information on that date. Appellant does not contend that the Regional Director should have used prices from Sept. 2001, rather than from Dec. 2001, and of course such an argument would not be consistent with Appellant's contentions elsewhere that the timber could not be profitably harvested in 2001.

profit of 19.3%. Opening Brief at 12. The Board concludes that Appellant has failed to satisfy its burden to prove that BIA's use of a 20% profit and risk contingency figure was unreasonable or erroneous.

In addition to raising arguments about the Regional Director's calculation of damages, Appellant seeks to revisit some of the same liability issues raised in No. IBIA 02-15-A. The Board declines to revisit those issues in the context of reviewing the Regional Director's December 21, 2001, decision, or to allow Appellant the opportunity to re-argue issues for which briefing has concluded. In any event, Appellant largely, if not completely, reiterates the same arguments the Board has already rejected.

Appellant has not demonstrated that the Regional Director's calculation of damages was unreasonable or not supported by substantial evidence. 20/

In its Notice of Appeal, Appellant faults the Regional Director for not crediting a \$75,000 performance bond as a payment — i.e., for asserting that Appellant had made a total of \$303,760 in payments, rather than \$378,760, and therefore still owed a balance of \$303,760 in damages. Appellant does not pursue this issue in either its opening or reply briefs. Assuming Appellant did not intend to waive this argument, it is not clear from the record what the current status of the performance bond is, but the Board does not read the Regional Director's decision as finding that if BIA collects or has collected on the performance bond, that would not count toward a discharge of Appellant's liability.

### Conclusion

The Board concludes that the Regional Director's decisions, with the exception of his incorrect characterization of Appellant's 1998 payment as an "advance payment," are reasonable and supported by substantial evidence, and that Appellant has failed to satisfy its burden to prove error.

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20/ For the first time in its reply brief, Appellant contends that BIA erred in using the U.S. Forest Service Region 6 program for calculating timber volume (Alaska is in USFS Region 10), and that the Region 6 program applies to Sitka spruce, whereas the timber at issue in this case is not Sitka spruce, but is a hybrid of Sitka and White Spruce. Considering the fact that BIA's methodology for estimating timber volume, including its use of the Region 6 program, has been part of the record from the beginning of this appeal, and considering that the record is replete with references to this timber as Sitka spruce — including statements from Appellant's own forester — the Board applies its usual rule and declines to consider these argument raised for the first time in a reply brief. See supra, 41 IBIA at 161 (Board does not consider arguments raised for first time in reply brief).

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board affirms the Regional Director's October 1, 2001, decision, except to vacate the Regional Director's characterization of Appellant's 1998 payment, and affirms the Regional Director's December 21, 2001, decision.

I concur:

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// original signed  
Steven K. Linscheid  
Chief Administrative Judge

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// original signed  
David B. Johnson  
Acting Administrative Judge